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CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

No. 266

JOSEPH ALCIDE LANDRY, *Petitioner*,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HOMER HENDRICKS,
920 Southern Building,
Washington 5, D. C.
Counsel for Petitioner.

Of Counsel:
DONALD LABBÉ,
Lafayette, Louisiana.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Joseph Alcide Landry, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 14, 1945 (R. 97), petition for rehearing (R. 99) denied May 15, 1945 (R. 111), reversing a judgment of the United States District Court in and for the Western District of Louisiana (R. 12-33 and R. 70-78).

Short Statement of Matter Involved.

Joseph Alcide Landry sued the Mutual Life Insurance Company in the United States District Court for recovery of benefits under an insurance policy containing a total and permanent disability clause which is hereinafter repro-

duced. The petitioner had unquestionably become totally disabled by a disease of his prostrate gland in 1938; due to his want of realization that his policy contained a disability clause which entitled him to monthly payments he did not file proof of claim until March 1943 (R. 66), soon after he realized that he was entitled to such benefits. Landry had become sixty years of age on August 4, 1942. All of the premiums due by him on the policy had been paid. The insurance company denied liability on the ground that no right of action existed because petitioner failed to file proof of claim before attaining the age of sixty years (R. 66). When suit was instituted the insurance company filed a motion to dismiss on the ground that the petitioner had no right of action for the reason stated above; this motion to dismiss was overruled by the District Court in a written opinion (R. 12-33) reported in 54 F. Supp. 356.

The case was tried on the merits and the insurance company did not contest the total and permanent disability of the petitioner; judgment was rendered by the District Court (R. 70-78) reaffirming the prior opinion on the motion to dismiss (R. 12-33), and granting judgment in favor of petitioner for the accrued disability benefits and refund of premiums paid during such disability (R. 77-78). Petitioner's prayer for the application of statutory penalities was denied.

The insurance company appealed from the judgment of the District Court. Landry appealed from the portion of the judgment denying the application of statutory penalties, but subsequently abandoned his appeal (R. 99).

The pertinent provisions of the policy relative to disability benefits which are presented for interpretation, as they affect petitioner's rights herein, are reproduced below. From the front page of the policy (R. 57) we quote:

> "and if the insured is totally and presumably permanently disabled before age 60, will pay to the insured $50.00 monthly during such disability, increasing after

five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3."

From page 2 of the policy (R. 59):

"SECTION 3. BENEFITS IN EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60:

"TOTAL DISABILITY.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation.

"PERMANENT DISABILITY.—Total disability shall, during its continuance, be presumed to be permanent:

"(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured; or

"(b) If such disability has existed continuously for ninety days.

"WHEN BENEFITS BECOME EFFECTIVE.—If, before attaining the age of sixty years and while no premium on this Policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

"BENEFITS. (a) INCREASING INCOME.—The Company will pay a monthly income to the Insured of the amount stated on the first page hereof ($10 per $1,000 face amount of Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such amount at which it shall remain while total and permanent disability continues.

"(b) WAIVER OF PREMIUM.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability."

There is a printed rider or a supplementary clause which appears on the back of the policy (R. 65) which reads as follows:

> "SUPPLEMENTARY BENEFITS TO SECTION ENTITLED 'BENEFITS IN EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60.'
>
> "BENEFITS IF PROOF DELAYED AND NO PREMIUM IN DEFAULT.—If, while no premium is in default, the proof furnished the Company under the section providing for 'Benefits in Event of Total and Permanent Disability before Age 60' is such as to entitle the Insured to the Disability Benefits provided for therein, and if due proof is also furnished the Company that such disability has been continuous since its beginning, the Company will;
>
> "(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of such proof instead of as of the date of receipt of such proof, and,
>
> "(b) Return any premium due after the beginning of such disability which has been paid during the continuance thereof.
>
> "BENEFITS IF PREMIUM IN DEFAULT NOT OVER SIX MONTHS.—If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default, DUE PROOF IS RECEIVED BY THE COMPANY BEFORE THE INSURED SHALL HAVE ATTAINED THE AGE OF SIXTY YEARS that the insured was totally and permanently disabled, as defined in the section entitled 'Benefits in Event of Total and Permanent Disability before Age 60' at the date when such premium in default fell due, and has been continuously so disabled since said due date, the Policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred." (Capitalization ours)

There is no other provision in the policy as to the time when proof of claim for disability benefits must be filed;

and there is no forfeiture clause for failure to file claim within any stated time.

Opinions Below.

The majority and dissenting opinions of the Circuit Court of Appeals (R. 91) are reported in 148 F. (2d) 699. The majority opinion held that the policy required, as a condition precedent to recovery, that proof of claim be filed by the insured before attaining age sixty. In a dissenting opinion Circuit Judge McCord held that the disability clause governing petitioner's rights was ambiguous and should be construed in favor of the insured.

The District Court in an opinion on the motion to dismiss (R. 12-33, reported in 54 F. Supp. 356) and in an opinion on the merits (R. 70-77; reported in 56 F. Supp. 156) held that the policy did not require Landry to file proof of disability before attaining the age of sixty.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the Circuit Court of Appeals erred in reversing the decision and judgment of the District Court (R. 12-33, 70-78), which held that it was clear and unambiguous that the disability clause in the Landry policy did not require him to file proof of claim of disability before attaining the age of sixty.

Specifications of Errors and Reasons for Granting the Writ.

(1) As the disability clause of the Landry policy, including the rider, is a printed form of a large insurance company, we must assume that it is contained in thousands of similar policies issued to policy holders all over the country and that consequently the correct interpretation of this clause is a matter of great importance and general interest.

(2) The Circuit Court of Appeals erred in holding that the filing of proof of claim before age sixty was a condition precedent to recovery.

Section 3 of the policy requires that the insured shall file proof of claim of disability before attaining the age of sixty; the printed rider which gives supplementary disability benefits, is divided into two sections, the first defining the rights of an insured whose premiums are not in default, and the second defining the rights of an insured whose premiums may be in default not over six months. The first section of the rider does not specify that the insured must file proof before age sixty, but the second section specifies in precise terms that proof must be filed before age sixty. The inclusion of this requirement in the second section of the rider (R. 65) and its exclusion from the first section (R. 65) evidences the intention that the filing of proof of disability by an insured whose premiums are not in default does not have to be made prior to attaining the age of sixty years.

(3) The Circuit Court of Appeals erred in holding (R. 93) that the weight of authority in the interpretation of the disability clause involved is in favor of the construction urged by the Mutual Life. In fact counsel for both sides have admitted that this entire disability clause, including the printed rider with its two sections, has never been construed by any court in the United States with regard to the right of the insured to file proof of claim of disability after age sixty, and accordingly the matter is *res novo*.

(4) The Circuit Court of Appeals erred in holding (R. 93) as follows:

> "but more important for us, it is settled in Louisiana from which this case comes, that such a provision is a condition of, and compliance with it is essential to recovery."

(citing *Clesi* v. *National Life & Accident Ins. Co.*, 193 So. 897 (La. App.), affirmed 195 La. 736, 197 So. 413).

The policy involved in the Clesi case contained a disability clause which is not similar to the language presented for interpretation in the instant case. The Clesi case merely reiterates the well settled principle that an insurance company may, by the use of clear language, make the filing of proof of claim within a stated time a condition precedent to recovery.

(5) Alternatively, the Circuit Court of Appeals erred in failing to hold that the disability clause involved is ambiguous, and that accordingly it should be construed in favor of the insured. A clause in a policy is ambiguous if it is susceptible of two reasonable interpretations. In this case the District Judge and the dissenting Circuit Court Judge reached an interpretation sustaining the contention of the insured; and the two Circuit Court Judges delivering the majority opinion reached an interpretation sustaining the contention of the insurance company. The diversity of interpretation of these four learned judges is proof of the ambiguity of the clause involved.

Your Honorable Court in the case of *Strochmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435, in holding that a clause in an insurance policy was ambiguous, cited as an element of proof of such ambiguity the fact that the District Court and the Circuit Court of Appeals had arrived at different interpretations; and also cited as an element of ambiguity the fact that arguments of counsel both presented reasonable divergent constructions.

The following sound reasoning is reproduced from the dissenting opinion of Judge McCord (R. 95):

> "A writing is ambiguous when it is subject to different reasonable interpretations. The court below held that this rider was clear and unambiguous, and that it did not require proof of disability before reaching the age of sixty. The majority of this court holds that the rider is clear and unambiguous, and does require proof before age sixty. My study of the language of the rider, read alone and in conjunction with related provisions of the policy, convinces me that the rider is reasonably susceptible of both interpretations; hence, it is ambiguous."

CONCLUSION.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

HOMER HENDRICKS,
920 Southern Building,
Washington 5, D. C.
Counsel for Petitioner.

Of Counsel:
DONALD LABBÉ,
Lafayette, Louisiana.

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